

No. 14,894

United States Court of Appeals  
For the Ninth Circuit

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In the Matter of the Application of  
MELVILLE C. WILLIAMS,  
For Writ of Mandamus.

PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

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*To the Honorable William Denman, Chief Judge, and the  
Honorable Albert Lee Stephens and the Honorable  
Homer T. Bone, Circuit Judges:*

Petitioner Melville C. Williams and Exchange Lemon Products Company, each severally and not one for the other, respectfully petition this Honorable Court for a rehearing of the Petition for Writ of Mandamus by Melville C. Williams and the Petition in Intervention by Exchange Lemon Products Company, and in support of this petition represent as follows:

Melville C. Williams and Exchange Lemon Products Company each reserve their argued positions as to each of the points in the said Petition for Writ of Mandamus and the said Petition in Intervention but in this petition address themselves to a clearly apparent misunderstanding

as to the nature of the intended duties of Melville C. Williams as attorney for Exchange Lemon Products Company. Such misunderstanding resulted in a decision that a writ of mandamus was not required in order to restore to each of said petitioners the rights guaranteed under the Fifth Amendment to the Constitution of the United States.

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#### POINT ONE.

*The opinion of this Court evidences a misunderstanding as to the nature of the intended duties of petitioner Melville C. Williams as counsel for Exchange Lemon Products Company in that it assumes that said Melville C. Williams is not expected or required to appear as an attorney in the trial of the action entitled Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., et al., and to participate in that trial as an attorney, under the direction of Ferris E. Hurd, by examining and cross-examining witnesses, presenting evidence, arguing to the court and jury and assuming direction of the conduct of the trial if the need arises.*

The opinion of the Court states:

"It appears from the affidavits of his clients that they do not intend to have Williams conduct the trial of the litigation but that they will be represented by other counsel, duly admitted therefor. The attorneys actually having the trial of the case may have Williams sit with them as advisor, as would any non-admitted law clerk or secretary."

Apparently this statement in the Court's opinion is based on paragraph 7 in the Petition in Intervention of Exchange Lemon Products Company, which reads as follows:

“7. Exchange Lemon Products Company has acquainted Melville C. Williams during a three-year period with its files, records, personnel and business practices in regard to the matters alleged in the complaint and amended complaint on file in said action, and Exchange Lemon Products Company believes that the thorough knowledge of these matters acquired by Melville C. Williams over this extended period of time is and will be essential to the attorneys representing petitioner in court during the trial of said action and for that reason petitioner desires said Melville C. Williams to participate in the trial of said action. Petitioner will suffer irreparable injury in the trial of said action if Melville C. Williams does not participate in the trial.”

To clarify any misunderstanding as to what the words “participate in the trial” mean with reference to the relationship between petitioner Melville C. Williams and Exchange Lemon Products Company an affidavit on behalf of Exchange Lemon Products Company has been filed in these proceedings. This affidavit shows that Exchange Lemon Products Company retained Melville C. Williams, not as a law clerk or secretary, but as an attorney, to do, among other duties, subject to the direction of Ferris E. Hurd, the following:

- a) examine and cross-examine witnesses;
- b) present written evidence;



c) argue orally to the court;

d) argue orally to the jury;

e) assume direction of the entire case, in place of Ferris E. Hurd, temporarily or permanently, at any time.

There is no inconsistency in the act of Exchange Lemon Products Company in retaining Ferris E. Hurd as chief trial counsel in the pending action and retaining Melville C. Williams to do the foregoing things. It is common in the trial of a complicated antitrust case for the chief trial counsel to delegate to one of his subordinates the task of presenting certain evidence, examining and cross-examining particular witnesses or arguing particular points of law. The petition of Melville C. Williams and the Petition in Intervention by Exchange Lemon Products Company on file in these proceedings show that Melville C. Williams of all the attorneys is particularly familiar with the personnel and activities of Exchange Lemon Products Company. With the possible exception of Ferris E. Hurd, there is no attorney whose presence at the trial *as an attorney* is more important to Exchange Lemon Products Company.

The opinion of this Court, prior to the trial and necessarily without knowledge of the particular witnesses who may be called and particular problems which may arise in the course of the trial, has resulted in sanctioning the ouster of an attorney whose presence, as an attorney, may well be indispensable to his client. The defense of Exchange Lemon Products Company has been seriously jeopardized before the first witness has been called. The professional rights of Melville C. Williams have been per-



emptorily curtailed: Williams, a reputable and experienced attorney, has been relegated to the status of a "non-admitted law clerk or secretary" for the purposes of a case he has painstakingly prepared over the course of more than three years.

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#### POINT TWO.

*Because of such misunderstanding, the Court erroneously concluded that a writ of mandamus was not required in order to restore to said Melville C. Williams and to Exchange Lemon Products Company the rights guaranteed under the Fifth Amendment to the Constitution of the United States.*

This Court has previously held that an order revoking a lawyer's right to practice made without notice and hearing is not only error but beyond the jurisdiction of the district court.

*In re Los Angeles County Pioneer Society*, 217 F.2d 190 (9th Cir. 1954).

As pointed out by Circuit Judge Goodrich, to break off an attorney-client relationship while the case is pending for trial is to cause irreparable injury justifying the exercise of interlocutory review.

*Cooper v. Hutchinson*, 184 F.2d 119, 123-124 (3d Cir. 1950).

Viewed in this light, the cases cited in the opinion of the Court demand that the writ of mandamus be granted rather than denied in the instant proceeding. The tradi-

tional functions of the writ of mandamus are to confine a court to its prescribed jurisdiction, and to prevent clear abuses of judicial discretion.

*Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

Both functions are directly involved in the present case.

The instant writ is not being used as a substitute for appeal but is being used to prevent the denial of constitutional rights which no appellate action can possibly restore after trial.

Cf. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953), *supra*;

*Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943).

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### CONCLUSION.

Petitioner believes that the foregoing errors occurred through oversight and particularly through inadvertent factual error as to the nature of the precise attorney-client relationship existing between petitioner Melville C. Williams and Exchange Lemon Products Company. Any obscurity in the meaning of the words "participate in the trial" has, however, been clarified by the affidavit which has been filed in these proceedings by Exchange Lemon Products Company. In view of this relationship and in view of the cases cited in the brief of petitioner Melville C. Williams on file herein, petitioners respectfully submit

that this Court should reconsider its opinion and issue the writ of mandamus.

Dated, San Francisco, California,

November 14, 1955.

Respectfully submitted,

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*Of Counsel.*

## CERTIFICATE.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated, San Francisco, California,  
November 14, 1955.

HERBERT W. CLARK.

*Attorney for Petitioners  
Melville C. Williams  
and Exchange Lemon  
Products Company.*